No. 15,069

IN THE

United States Court of Appeals

For the Ninth Circuit

ZENOBIA PERKINS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

GEORGE M. YEAGER,
United States Attorney,
PHILIP W. MORGAN,
Assistant United States Attorney,
Fairbanks, Alaska,
Attorneys for Appellee.

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JURISDICTION.

The jurisdiction of the District Court below was based upon the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended, 48 U.S.C. 101.

The jurisdiction of this Court of Appeals is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE.

At 1:00 A.M. on April 6, 1955, Staff Sergeant Gerald W. Griffin, who was an air policeman attached to the Office of the Provost Marshal at Ladd Air Force Base,

went to the Territorial Police Office located at 1325 South Cushman Street in Fairbanks, Alaska. There, Emery Chappel, a Territorial Police Officer, gave Griffin sixty dollars consisting of two twenty dollar bills and four five dollar bills. (TR 52.) Each bill was marked with a cross in the upper right hand numeral. After the bills were placed in a wallet, they were dusted with gentian violet, a detection powder which turns purple when touched by a person's hand because moisture is present. Chappel also gave Griffin ten dollars to use in buying drinks so that it would not be necessary to remove any money from the wallet.

Griffin was then taken by the officers to South Cushman where he left the vehicle and walked across the field to the Birdland Bar. Upon entering the bar at 2:05 A.M., he saw Ed Merk, the bartender, Ruby, Vicky, and the Princess (appellant). (TR 16.) He bought himself and the three girls a drink from the ten dollars and engaged in conversation with the appellant. The Princess wanted to know whether he wanted to have a little fun. Griffin testified, "so I told her that I didn't have but a few dollars and it had to last me the rest of the month so when I opened the wallet she made the statement, well, I had plenty of money because she had seen it in there . . ." (TR 19.) Griffin feigned drunkenness and laid his head on the bar. The appellant talked with Floyd West, another patron at the bar, and asked him to go with her. When they started toward the rear of the bar, the appellant came back and shook Griffin a

couple of times and said, "Where is your wallet, honey?". When she received no response, appellant took the wallet out of his jacket pocket. (TR 22.) She said, "Well, I will keep it for him. It is only eleven dollars anyway", then left the bar with Floyd West. Griffin pretended to be sick and left the bar to notify the police officers, who had it under surveillance. Chappel testified that Griffin appeared in front of the bar at 4:45 A.M. The officers drove to the Birdland and got the information from Griffin as to what took place. (TR 57.) Then, they entered the bar, but the appellant was not there. Chappel asked the owner, Ed Merk, where the appellant was. Finally, Merk went into the house behind the bar and appellant came out with the wallet. The officer had made a previous demand for the money from Merk. (TR 62.) However, it was thirty minutes before she appeared. (TR 78.) At that time, Chappel saw the wallet in her hand and asked for it, but appellant did not give it to him until she had entered the bar. (TR 60.) It was daylight and the sun was out. (TR 64.) Chapple observed that the purple stain was on her hands. (TR 64.) The bills in the wallet were wrinkled and purple stain was apparent to the officer, (TR 60), but he did not notice the wallet being damp. (TR 71, 72.)

Officer Dankworth saw the appellant come out of the house behind the Birdland Bar. He also testified that the appellant had a wallet at that time underneath a brown handbag. (TR 91.)

Lucille Ashton, a matron at the Federal Jail, testified that she saw the appellant on April 6, 1955, and ob-

served a purple stain on her left breast, her brassiere and hands. (TR 91.)

Appellant claims that the wallet was on the bar when Griffin left, that she counted the money inside and gave it to the bartender. (TR 112.) Ed Merk, owner of the bar and employer of appellant, testified that the wallet was in the bar. He also testified that he had been in his house once or twice before the officers noticed the stain on his hand. (TR 191.) William Newkirk testified that he thought the wallet was on the bar when Griffin left (TR 150), and Ed Merk threw it behind the bar where he kept the glasses. Leon Urban also testified for appellant and stated that Griffin was showing some pictures at the bar. (TR 138.)

A complaint was filed before the U. S. Commissioner on April 6, 1955, charging the appellant with the crime of larceny. Under the Territorial Statute, if the amount is less than one hundred dollars, it is a misdemeanor. On April 29, 1955, a jury trial was held before the United States Commissioner. The jury returned a verdict of guilty. Appellant appealed to the District Court. On August 8, 1955, the case was tried in the District Court and the jury returned a verdict of guilty.

SUMMARY OF THE ARGUMENT.

Appellant took a wallet containing sixty dollars from the possession of Gerald Griffin at the Birdland Bar. She then went to the house of Ed Merk, which

was located behind the Birdland. After thirty minutes had elapsed, Merk went in after her. The appellant appeared with the wallet in her hand. Officer Chappel asked her for the wallet outside the bar, but she did not give it to him until they were inside. Her hands were stained purple from the detection powder. The jury could reasonably draw the inference that she had deposited the bills in her bra and that caused the brassiere to have purple marks on it, and this would also account for the purple stain on her left breast. Appellant made the statement to Griffin that he had plenty of money because she had seen it. (TR 19.) Yet, she later made the selfserving declaration, "Well, I will keep it for him. It is only eleven dollars anyway." Considering the evidence, the Court did not err in denying appellant's motion for a judgment of acquittal at the close of the plaintiff's case.

The appellant denied she stole the wallet and took it to the house at the rear of the Birdland Bar. Whether the appellant had the intent to steal was a question of fact for the jury to decide and the Court properly allowed the case to go to them for their decision.

Appellant's instruction number 1 was adequately covered by the Court's instruction number III. (TR 251.)

A complaint was filed before the United States Commissioner charging the appellant with the crime of larceny in violation of Section 65-5-41 of the Alaska Compiled Laws Annotated, 1949, as amended. Section 65-5-41, ACLA, 1949, was amended by Chapter 61, Session Laws of Alaska, 1955, (see appendix), wherein

the property stolen must exceed in value one hundred dollars before the crime of larceny can be a felony. Counsel raised an objection for the first time in the District Court that the proof showed a larceny from the person, which is a felony under the territorial statutes. The appellant cannot complain that she should have been convicted of a felony instead of a disdemeanor.

Appellant has failed to show in what manner the instructions were prejudicial. The question of circumstantial evidence was raised when counsel for appellant requested an instruction on circumstantial evidence. (TR 233, 234.)

Mr. Taylor argued entrapment in the lower court, but when confronted with the fact that the government was prepared to show that complaints had been received by the Territorial Police in regard to appellant rolling patrons at the bar in accordance with the decision in *Trice v. U. S.*, 211 F. 2d 513 (9th Cir. 1954), he denied that entrapment was his defense. (TR 8.) Now, he raised this argument before this Court without the Government having an opportunity to show that the officers were not out entrapping an innocent person. *Willie Earl Frazer v. U. S.*, No. 14,898 (9th Cir. May 8, 1956).

ARGUMENT.

I.

APPELLANT'S MOTIONS FOR ACQUITTAL WERE PROPERLY DENIED.

At the close of the government's case in chief the evidence disclosed that the appellant, while in the Birdland Bar about 5:00 A.M., had taken a wallet containing sixty dollars the property of another from the possession of Gerald Griffin. He had feigned drunkenness after consuming several drinks. She left the bar within six or seven minutes after, making the remark that she would keep it for him as there was only eleven dollars anyway. Earlier in the evening, she had told Griffin that he had plenty of money because she had seen it. (TR 19.) Appellant did not come out of Ed Merk's house at the rear of the bar until Merk had gone in after her, although she knew the police were outside. When she did appear, Officer Chappel saw and asked her for the wallet, but she proceeded into the bar before relinquishing possession to him. Chappel inspected the money and found the bills were partially purple and wrinkled. (TR 60.) It was easily discernible that the money had been handled and one bill had more discoloration than the others. (TR 81, 74.) He also did not notice that the wallet was damp.

Officer Dankworth, who had come to assist Chappel after receiving a call, saw the appellant with the wallet outside the bar and walked inside when the others entered for a distance of fifteen feet. (TR 86.)

The matron at the Federal Jail observed purple stains on appellant's left breast and smudges on the brassiere itself.

If the appellant did not intend to steal the money, why did she take it from the bar into another building. The reasonable thing to do would be leave it with the owner, Mr. Merk. Of course later when she took the stand in her own defense that is exactly what she said happened.

The Court denied the motion for acquittal. (TR 100, 101.) The question whether or not the appellant intended to steal the money was properly left for the jury's deliberation and decision. *Morissette v. U.S.*, 342 U.S. 246, 274.

Appellant then testified that she picked the wallet up from the bar after Griffin had got back around the door. (TR. 112.) She also testified at this time that she said, "Probably not ten or twelve dollars in here anyway". Griffin testified appellant made the statement when she took the wallet. She also said, "Here is the man's wallet. Keep it for him until he gets back". Later she testified, "That is the reason I made the statement that I would keep it for him". (TR 124.) Mr. Merk also testified that the wallet and money was in the bar all the time. Now, at the close of all the evidence an additional conflict presented itself; whether the appellant took the wallet and money to Merk's residence or left it with the owner. The Court again denied the motion for judgment of acquittal.

II.

THE APPELLANT WAS CORRECTLY CHARGED AND CONVICTED OF A MISDEMEANOR UNDER THE LARCENY STATUTE.

Appellant contends the conviction cannot stand because the proof showed a larceny from the person. The complaint charged a misdemeanor under Section 65-5-41, Alaska Compiled Laws Annotated, 1949, as amended. The complaint did not allege from the person as required by Section 65-4-24 of the Alaska Compiled Laws Annotated, 1949.

Counsel was aware that the Government had charged a misdemeanor. (TR 65, 80.) One time he argues that the evidence does not support a conviction for a misdemeanor and on the other hand he urges that this Court reverse on the grounds that the evidence showed the crime to be a felony.

In the case of *People v. Lefkowitz,* 248 N.Y.S. 615, the defendant was charged in an information with the crime of petit larceny. He was found guilty and on appeal argued that if he was guilty of any crime, it was a more serious crime than that for which he was convicted. He contended that he should have been indicted and tried for a felony. The Court in its opinion stated,

> "It is argued that since the information alleges facts which constitute a more serious crime, the defendant may not be prosecuted for the lesser offense. It is well settled that the defendant may be charged with and tried for the offense which the District Attorney believes is the proper charge in such a case." "It is frequently necessary for the district attorney to prosecute for a lesser de-

gree of crime because of the surrounding circumstances. There may be some doubt as to the ability of the People to prove a higher degree of crime and the district attorney may reach that conclusion. Of course, a district attorney should be careful to prosecute for the crime for which the defendant may be convicted. The mere fact that the district attorney failed to do so is not a ground for the reversal of the judgment of conviction. In holding that it may be done, we are not deciding that it should be done."

See:

People v. Stein, 80 N.Y.S. 847;

People v. Crote, 153 N.Y.S. 631, 632, affirmed 170 App. Div. 898, 154 N.Y.S. 1137.

In *People v. Goldberg, et al.,* 109 N.Y.S. 906, 908, the Court said,

"If the defendants could have been convicted of an attempt to commit robbery, the fact that the district attorney saw fit to prosecute them for a lesser crime is certainly no reason that a conviction for the lesser crime should be reversed."

III.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT.

Appellant contends the evidence does not sustain the verdict. In support of this point the Court is asked to consider the testimony of the witnesses for the defense as stating the true facts of the case. The credibility of witnesses is a matter for the jury to decide. *Gage v. U. S.*, 167 F. 2d 122, 124 (9th Cir. 1948). It is apparent that the jury believed the evi-

dence produced by the appellee. The evidence necessary to support the conviction has been set forth in the appellee's counterstatement of the case.

IV.

THE COURT DID NOT ERR IN THE INSTRUCTIONS ON THE ELEMENTS OF THE CRIME.

The Court included in instruction number three the elements of the crime of larceny. (TR 251, 252.) In the common law appellant would find some support for the argument that an intent to appropriate the property to her own use must exist before a finding of guilty could be returned. This element has not been uniformly favored by the Courts, and according to the weight of modern decisions the element of personal gain to the taker is not essential. It is regarded as sufficient if there is an intention to permanently deprive the owner of his property. See Note, 12 ALR 804. The territorial statute set forth in the appendix does not require this element alleged as error by appellant.

V.

THE COURT DID NOT COMMIT PREJUDICIAL ERROR IN ITS INSTRUCTION TO THE JURY.

Appellant contends the Court committed prejudicial error in referring to an indictment and the use of the word felonious, when describing the taking. Counsel did not object to these instructions in the trial Court as required by Rule 30 of the Federal Rules of Crimi-

nal Procedure. Now he cannot assign as error the use of the words indictment and felonious unless this Court is confronted with an extraordinary situation that would justify a disregard of the rule. *J. A. Herzog v. U. S.,* No. 14,611 (9th Cir. Decided May 29, 1956).

The Court did not err in giving instruction number nine defining direct and circumstantial evidence. (TR 256, 257.) Even if there were no circumstantial evidence for the jury to consider in this case, which is not correct because evidence of intent must necessarily be circumstantial, the Court's instruction number fifteen would be sufficient to cure the alleged error. (TR 260.) The instructions considered together fairly informed the jury of the standards to apply to the larceny charge. *Elwert v. U. S.,* No. 14,846 (9th Cir. Decided March 22, 1956).

CONCLUSION.

For the reasons set forth above, appellee requests this Court to affirm the judgment of the Court below.

Dated, Fairbanks, Alaska,
July 16, 1956.

Respectfully submitted,
GEORGE M. YEAGER,
United States Attorney,
PHILIP W. MORGAN,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

Session Laws of Alaska, 1955.

Chapter 61

AN ACT

Amending 65-5-41 ACLA 1949, pertaining to larceny; and declaring an emergency. Be it enacted by the Legislature of the Territory of Alaska:

Section 1. Section 65-5-41 ACLA 1949 is hereby amended to read as follows:

Sec. 65-5-41. *Larceny of money, etc.: Description in indictment.* That if any person shall steal any money, goods, or chattels, or any Government note, or bank note, promissory note, or bill of exchange, bond, or other thing in action, or any book of accounts, order, or certificate, concerning money or goods, due or to become due or to be delivered, or any deed or writing containing a conveyance of land or any interest therein, or any bill of sale, or writing containing a conveyance of goods or chattels or any interest therein, or any other valuable contract in force, or any receipt, release, or defeasance, or any writ, process, or public record, the property of another, such person shall be deemed guilty of larceny, and upon conviction thereof, if the property stolen shall exceed in value one hundred dollars, shall be punished by imprisonment in the penitentiary not less than one nor more than ten years; but if the property stolen shall not exceed the value of one hundred dollars, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month

nor more than one year, or by fine not less than twenty-five nor more than one hundred dollars; Provided, That in all prosecutions for the larceny of money wherein an exact description of the number and denomination of the coin or other money taken cannot be given, it shall be sufficient to allege that the same was lawful money of the United States, or of any other country or countries as the case may be, and the value thereof in money of the United States.

Section 2. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.